

1 Larry A. Hammond, 004049
2 Anne M. Chapman, 025965
3 OSBORN MALEDON, P.A.
4 2929 N. Central Avenue, 21st Floor
5 Phoenix, Arizona 85012-2793
6 (602) 640-9000
7 lhammond@omlaw.com
8 achapman@omlaw.com

9 John M. Sears, 005617
10 P.O. Box 4080
11 Prescott, Arizona 86302
12 (928) 778-5208
13 John.Sears@azbar.org

14 Attorneys for Defendant

15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **REPLY IN SUPPORT OF**
) **MOTION TO PRECLUDE LATE**
) **DISCLOSED EVIDENCE,**
) **WITNESSES AND EXPERTS**
) **AND TO DISMISS THE DEATH**
) **PENALTY AS A SANCTION**
) **UNDER ARIZONA RULE OF**
) **CRIMINAL PROCEDURE 15.7**

22 On February 5, 2010, Steven DeMocker filed a Motion to Preclude Late Disclosed
23 Evidence, Witnesses and Experts and to Dismiss the Death Penalty as a Sanction. The
24 parties argued this motion on February 19, 2010. On February 22, 2010, pursuant to
25 additional late disclosed evidence by the State, Mr. DeMocker filed a Supplemental
26
27
28

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAR -1 PM 4: 58

JEANNE HICKS, CLERK
Heather Figueroa

BY: _____

1 Memorandum regarding this motion. The State responded on February 26, 2010. Mr.
2 DeMocker hereby replies.¹

3 ARGUMENT

4 The State's response does not deny its repeated and continued refusal to comply
5 with this Court's orders and Rule 15.1 of the Arizona Rules of Criminal Procedure.
6 Instead, the State complains that the defense team continues to "persistently" notice the
7 State's failures and that the Court should just accept that "mistakes are made" with
8 respect to its "disclosure habits." It is apparently acceptable to the State that "mistakes
9 are made" and "it is currently investigating" "unsolved aspect[s] of this case," all the
10 while seeking to kill one of its citizens as aspects of the case remain "unsolved" and its
11 "mistakes" deny the due process, fair trial and confrontation rights guaranteed by the
12 Constitutions of Arizona and the United States. While this may be acceptable to the
13 State, it is **not** acceptable to the Supreme Court which requires "'extraordinary measures
14 [be taken] to insure that the [Accused] is afforded process that will guarantee, as much as
15 is humanly possible, that [a sentence of death not be] imposed out of whim, passion,
16 prejudice, or mistake.'" *Caldwell v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (*quoting*
17 *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). The State's
18 position should be rejected by this Court.

19 **A. Shoe Print Reports & Eric Gilkerson Should be Excluded**

20 The State, in attempting to avoid the obvious problems with the fact that it
21 withheld shoe print evidence until it thought it could connect that evidence to Mr.
22 DeMocker, plays fast and loose with what that evidence actually is on this point.

23
24 ¹ For the Court's convenience, the following motions about disclosure are also pending: Defendant's Motion to
25 Preclude Late Disclosed UBS Evidence filed February 24, 2010; Defendant's Supplemental Motion to Preclude
26 Testimony of Richard Echols filed February 24, 2010; Defendant's Motion to Preclude State's Computer Forensic
27 Experts and Reports filed February 25, 2010; Defendant's Motion in Limine to Exclude Evidence Offered in
28 Violation of Rule of Evidence 403 and 404(b) filed February 25, 2010; Defendant's Motion to Preclude Evidence
regarding Late Sorensen Laboratory Forensic Testing filed February 25, 2010; Defendant's Motion to Preclude
Witnesses, for Attorneys' Fees and for Other Sanctions, Including Dismissal of the Death Penalty filed on February
26, 2010; State's Motion to Preclude Character Evidence of James Knapp.

1 Although at the hearing on February 19, 2010, the State repeatedly identified the
2 shoeprint evidence as "matching" shoeprints found at the scene, the State now qualifies
3 the shoe print comparison made by Mr. Gilkerson as opining that the shoes "may" have
4 been made by a La Sportiva brand shoe. Regardless of how the State parses the evidence,
5 the State held on to the evidence for months before it was disclosed to Mr. DeMocker.
6 This was during the time when the shoe print evidence was being litigated before this
7 Court. The State possessed the FBI report regarding shoe prints for over three months.
8 The State's response acknowledges that it was in contact with these witnesses since at
9 least October of 2009. Furthermore, the State had been in contact with these witnesses
10 for many months prior to the report and these contacts were not and have not been
11 disclosed.

12 The prejudice from this late disclosure is obvious. The defense is forced to
13 review, analyze and process the newly disclosed expert information, as well as to
14 potentially identify and retain defense experts while the State sat on this evidence for
15 months. The Court should exclude this evidence as a sanction for the State's inexcusable
16 behavior with regard to this evidence.

17 Eric Gilkerson should also be excluded as an expert. Mr. Gilkerson was known to
18 the State at or near 5 months ago and yet was not disclosed until February. The report
19 from Mr. Gilkerson, dated October 22, 2009, was also not disclosed until February, 2010.
20 The State has **still** not disclosed Mr. Gilkerson's qualifications and lists him only as an
21 "Examiner." Testimony and in limine hearings on the issue of shoe prints was ongoing
22 while the State possessed this evidence and did not disclose it. The State should be
23 prohibited from offering Mr. Gilkerson as a witness at this incredibly late date.

24 **B. UBS**

25 Although addressed under a separate defense motion to preclude, the State
26 responds here to the issue of its late produced massive quantity of UBS documents in its
27
28

1 supplemental motion. As an initial matter, the Court has already ruled that evidence of
2 Mr. DeMocker's business practices are inadmissible under Rule 404(b). For this reason
3 alone, the Court should exclude any evidence from the recently disclosed 14,000 emails
4 from Mr. DeMocker's UBS computer.

5 Furthermore, the State did not subpoena this information from UBS until
6 December 10, 2009. As the Court noted at the initial May 12, 2009 hearing where the
7 June 22 disclosure date was set, the State had a duty to investigate its case. Waiting until
8 over a year after Mr. DeMocker was arrested to subpoena documents from his employer
9 and to then disclose over 23,000 pages with less than three months to trial does not
10 comply with this obligation, not even remotely. Any delay was not occasioned by
11 anything other than the State's failure to timely subpoena the information during the first
12 17 months of its investigation. This information should be excluded by this Court both as
13 not relevant based on prior rulings and as not timely disclosed.

14 **C. Gregory Cooper**

15 With respect to Mr. Cooper, the State asserts, without any basis, that even though
16 no report from Mr. Cooper has been disclosed, the defense team will have adequate time
17 to review any report and interview Mr. Cooper. Mr. Cooper was not disclosed as an
18 expert to the defense until February 18, 2010, with less than three months to trial. The
19 materials he relied on were not disclosed until February 26, 2010. Mr. Cooper, according
20 to his resume, is an expert on an almost endless array of topics. The State has failed to
21 respond as to how a "Criminal Behavior Analyst" has anything relevant and admissible to
22 say in light of this Court's in limine and 404(b) rulings. Even if he was qualified to
23 testify to something that continues to be relevant, his late disclosure and the failure of the
24 State to comply with the Rules and the Court's orders have put Mr. DeMocker in the
25 position of not being able to prepare to interview Mr. Cooper, prepare for his testimony,
26
27
28

1 research and prepare any potential experts or otherwise prepare for trial. Mr. Cooper
2 should be precluded as a witness in this matter.
3

4 **D. Cell Phones & Sgt. Sy Ray**

5 The State is correct that the 44th Supplemental information contained some
6 information with respect to James Knapp's cell phone. It was also clear from this
7 disclosure that the State had not disclosed everything in its possession. For this reason,
8 the defense began asking for these materials. The defense and this Court were repeatedly
9 told by the State that these items *did not exist and that what did exist had already been*
10 *disclosed*. This false representation was made numerous times. The State's response that
11 this is somehow a "new development which requires new disclosure" is belied by the fact
12 that this communication was from November 2009. This is not a "new development" - it
13 was a withheld disclosure. It should be excluded.
14
15
16

17 The same is true with respect to Sgt. Sy Ray. The State was investigating cell
18 tower information as early as November 2009. It knew the defense was requesting
19 information about James Knapp at least as early as that as well. Specifically the defense
20 has repeatedly requested this missing piece of cell tower information the State possessed
21 for many months. It is disingenuous for the State to excuse its late disclosure of Sgt. Ray
22 by asserting that evidence regarding James Knapp's cell phone and whereabouts is a
23 "new development." He was identified for the first time as an expert in "cell phone
24 towers" on January 19, 2010, less than four months prior to trial. The defense has not
25 received any disclosure regarding him or his expertise in this area. The defense does not
26 know what Sgt. Ray relied on, does not know what the State proposes that he will testify
27 about, is not in a position to prepare for any interview of Mr. Ray, and cannot research
28

1 and retain experts to possibly rebut his testimony or prepare for trial. The State should
2 not be permitted to present expert testimony from this late disclosed expert.
3

4 **E. 15.1 Disclosure Regarding Experts**

5 The State does not deny its failure to comply with the disclosure orders of this
6 Court with respect to Dr. Pitt and its newly disclosed experts. These experts should be
7 excluded.

8 *1. Mr. Echols*

9
10 The State should be prohibited from calling Mr. Echols as a witness. The State
11 disclosed a list of documents Mr. Echols relied on for the first time on February 22, 2010.
12 It had been previously ordered to provide this information in November, and then again
13 by January 29, 2010. The State failed to comply with these orders and this failure has
14 prejudiced Mr. DeMocker's ability to prepare his defense, prepare his own experts and
15 conduct meaningful examination and confrontation of Mr. Echols's testimony.

16 The State represents that information regarding Mr. Echols's 15.1 disclosure was
17 compiled and added to the State's updated Bates Log with the 46th Supplemental
18 Disclosure on January 29, 2010. The State urges to this Court that it made a "mistake"
19 and did not learn of its failure to disclose the list until Friday, February 19, 2010. This
20 explanation does not comport with the facts. On January 29, 2010, the State emailed the
21 46th Supplemental Disclosure to the defense. That email advised that an updated bates
22 and audio video log was sent to Big Picture and would be delivered to John Sears on
23 February 1, 2010. Leaving aside that this Log was not disclosed to the defense by the
24 January 29, 2010, date as ordered by the Court, when the defense received the disclosure
25 from Big Picture, the bates Log was not on the CD.

26 On February 5, 2010, the defense filed the Motion to Preclude Late Disclosed
27 Evidence, Witnesses and Experts and outlined that it had not yet received any list of
28

1 documents relied on by Mr. Echols as ordered by the Court. The State knew immediately
2 that it had not provided the Log with the 46th Supplemental Disclosure because it was so
3 advised by the defense. The State's attempt to now explain its failure as a mere mistake
4 without explaining that the defense immediately asked for this document and told the
5 State on February 5th by Motion to the Court that this information had not been provided
6 does not make sense.

7 Mr. Echols' testimony is related to key issues in the case regarding Mr.
8 DeMocker's alleged motive and in support of aggravating circumstances. The defense
9 has been unable to interview Mr. Echols or to prepare its own experts. The State has
10 produced literally thousands of pages of financial information to the defense and claims
11 that it is using this information as proof of motive and in support of an aggravating
12 circumstance. Mr. Echols' previous testimony has been problematic and beyond the
13 scope of his expertise. In this context, the State's refusal to comply with Rule 15.1 or this
14 Court's orders which required the disclosure in November 2009 and January of 2010
15 should be sanctioned by Mr. Echols exclusion.

16 **F. Defendant's Statements**

17 The State does not deny that it disclosed to the defense for the first time on
18 January 28, 2010 over 1000 summaries of jail calls that the State had been compiling
19 since 2008. Nor does it deny that it failed to identify a supplemental report of some of
20 these jail calls as those it intended to rely on at trial. Nor does it deny that it was required
21 to identify those statements it intended to rely upon at trial by February 13th. The State
22 should be precluded from relying on these statements at trial.

23 In what can only be described as an absurd argument, the State asserts that
24 because it summarizes the calls in a supplemental report, as opposed to in a written form
25 that is not identified as a supplemental report prepared by numerous individuals, it was
26 therefore by its nature "clearly" identified as significant to the State's case. Even if this
27

1 were true, which it is not, given the 1000 plus other summaries provided at the same
2 time, the State still did not identify these calls as those it intended to rely on at trial as
3 required by this Court's orders and Rule 15.1. This Court should preclude the State's
4 reliance on these statements.

5 **G. Crime Scene Diagrams**

6 The State does not deny the violations with respect to crime scene diagrams; it
7 simply regards it, as with most other of its violations, as overstated. Bates number 17849
8 is labeled "Office-Scene Measurements: (7/3/08)" and what follows are two diagrams.
9 The State's response acknowledges that the measurements were taken on July 3, 2008,
10 and not disclosed until January, 2010. The defense has been requesting these
11 measurements and diagrams since March of 2009. These were specifically requested and
12 the State specifically denied that they existed. This was false. The State should be
13 prohibited from now using that which it previously falsely denied existed.

14 The State knows no shame. Every violation of the Court's Orders or Rules of
15 disclosure identified by the defense is characterized as "overstated," a "mistake," to be
16 "anticipated," or otherwise excused. Instead of abiding by the minimal rules that are
17 required to ensure fundamental rights when the State seeks to execute one of its citizens,
18 the State excuses its conduct and is undeterred by "unsolved aspect[s] of this case." Rule
19 15.7 accords the Court broad discretion to impose a sanction and the Supreme Court puts
20 this responsibility in the hands of the trial court. "[I]t is the trial court's responsibility to
21 enforce our disclosure rules. ... When necessary, trial judges possess the power to
22 invoke sanctions ... for failure to comply with discovery rules." *Tucker*, 157 Ariz. at 441
23 (emphasis added). This Court should strike the death penalty in this case and preclude
24 the late disclosed witnesses, evidence and experts.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court prohibit the State from offering testimony from the late disclosed witnesses or experts and from introducing late disclosed evidence and strike the death penalty.

DATED this 1st day of March, 2010.

By: 

John M. Sears
P.O. Box 4080
Prescott, Arizona 86302

OSBORN MALEDON, P.A.
Larry A. Hammond
Anne M. Chapman
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Attorneys for Defendant

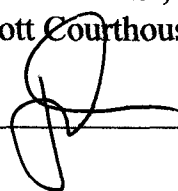
ORIGINAL of the foregoing hand delivered for filing this 1st day of March, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered this this 1st day of March, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
Prescott Courthouse basket

A handwritten signature in black ink, appearing to be 'J. Butner', is written over a horizontal line that spans the width of the text area.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28